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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. [redacted] 18

THE PEOPLE OF PUERTO RICO,
Petitioner,

vs.

THE SHELL CO. (P. R.) LIMITED, *et al.*,
Respondents.

BRIEF FOR RESPONDENT THE SHELL CO. (P. R.) LIMITED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

THE PEOPLE OF PUERTO RICO, *Petitioner,* vs. THE SHELL CO. (P. R.) LIMITED, *et al.*, *Respondents.*	No. 842

BRIEF FOR RESPONDENT THE SHELL CO. (P. R.) LIMITED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals (R. 49-61) is reported in 86 F. (2d) 577. The opinion of the Supreme Court of Puerto Rico (R. 36-45) has not yet appeared in the English edition of the Puerto Rico Reports. The opinion (judgment) of the District Court of San Juan (R. 27) is not officially reported.

STATEMENT OF THE CASE

The petition is for a writ of certiorari to review a judgment of the Court of Appeals for the First Circuit (R. 61).

That judgment affirmed a judgment of the Supreme Court of Puerto Rico (R. 45), which in turn had dismissed an appeal from a judgment of the District Court of San Juan (R. 27). In effect, therefore, the successive judgments of all three courts united in sustaining respondents' demurrers.

The information charged that the respondents

> "entered into a conspiracy and agreed on a plan previously framed by them, with the sole purpose of restraining and preventing the free competition among said corporations, the lawful and free competition of the business [sic], and the contracts for the distribution and sale of gasoline in the judicial district of San Juan and in the municipality of San Juan"

and

> "agreed to fix from time to time uniform and arbitrary prices at which gasoline should be wholesaled and retailed in the municipality of San Juan and in the judicial district of the same name"

and

> "agreed to sell and supply gasoline for retail only to such dealers as would agree to sell at the price fixed by said corporation * * *" (R. 3).

The ground of decision in each court was that the Puerto Rican Act of March 14, 1907[1] is invalid because it

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[1]Act of the Legislature of Puerto Rico, approved March 14, 1907, "An Act to protect Trade and Commerce Against Unlawful Restraints and Monopolies", Laws of Puerto Rico, 1907, pages 328-330, Comp. of Rev. Stats. and Codes, 1911, "Trusts", Pars. 2373-2379. This Act is set out in Appendix I of Petitioner's Petition and Supporting Brief, pages 55-56.

is legislation covering the same subject matter as the Federal anti-trust Acts, particularly the Sherman Act.[2]

As stated by the petitioner, the single question presented is whether the Puerto Rican Act of March 14, 1907 is valid. The courts below held that the insular Act is invalid because it covers the same subject matter as the Sherman Act and purports to confer upon the insular courts jurisdiction to punish acts which would constitute offenses against the Sherman Act.

STATUTES INVOLVED

That the Act of March 14, 1907 occupies the same field as the Sherman Act, is established by a comparison of the provisions of the two statutes:

THE SHERMAN ACT	THE ACT OF MARCH 14, 1907
Section 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or	*Section 1.* Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, commerce, business transactions, and lawful and free competition in a town, or among the several towns of Porto Rico is hereby de-

[2]Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. §§ 1-7.

There is no question but that the Sherman Act is applicable to trade "in any Territory of the United States". Moreover, all legislation of the Congress which is "not locally inapplicable" is made applicable to Puerto Rico by Section 9 of the Organic Act of Puerto Rico (Act of March 2, 1917, 39 Stat. 954, 48 U. S. C. § 734). *Cf. Domenech* v. *National City Bank*, 294 U. S. 199.

THE SHERMAN ACT

between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

Section 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations.

THE ACT OF MARCH 14, 1907

clared to be illegal. Every person who shall make any such contract or engage in any such conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such punishments in the discretion of the court.

Section 3. The district courts of the island are hereby vested with jurisdiction to prevent, prohibit, enjoin and punish violations of this law; and it shall be the duty of the attorneys of the district courts of the island to institute proceedings of injunction or any other civil proceeding to prevent, prohibit, enjoin, and restrain such violations.

This comparison makes it clear that the acts charged in the information in this case would constitute violations of both the federal and the insular law.

SUMMARY OF ARGUMENT

(1) The cases cited by petitioner as contrary to the decisions of the Court of Appeals in this case were all early cases in which the decision was based upon the erroneous assumption that the same act may be punished as an offense against both a territorial government and the United States. The error of that assumption has been established by the opinion of this Court, handed down two months after the enactment of the statute of Puerto Rico here in question, in *Grafton* v. *United States* (May, 1907) 206 U. S. 333. The *Grafton* case settles the only important question of federal law presented, since it leads necessarily to the conclusion that a territorial statute defining as a crime an act already punishable as an offense against the United States is in conflict with the federal law. Otherwise, a prosecution by the Federal authorities could not be defeated by a plea of prior trial for the same offense by the local territorial authorities.

(2) Regardless of any inconsistency with the Sherman Act, the Puerto Rican Act of March 14, 1907, is invalid under the doctrine of *El Paso & N. E. Ry.* v. *Gutierrez*, 215 U. S. 87, since it covers the same subject matter as the Sherman Act.

(3) In any event, the policy in favor of granting certiorari in cases of conflict between the circuits would appear to be inapplicable when the conflicting decisions are

not controlling in any court in which the same question is likely to arise today.

(4) Finally, the petition herein was not timely filed, as no adequate "cause" was shown for the extension beyond 3 months of the time to file.

ARGUMENT

I.

THE PRINCIPLE OF THE DECISION IN *GRAFTON* v. *UNITED STATES* (1907) 206 U. S. 333, HAS RESOLVED THE SUGGESTED CONFLICT OF AUTHORITIES AND SETTLED THE ONLY IMPORTANT QUESTION OF FEDERAL LAW PRESENTED.

Petitioner advances as a reason for granting the writ of certiorari that the decision of the Court of Appeals for the First Circuit in this case is contrary to decisions of the Supreme Courts of Montana, Wyoming, Utah and Oklahoma sustaining local territorial statutes despite direct Congressional legislation covering the same field. The Circuit Court of Appeals in this case expressed its disagreement with those opinions on the ground that they were based upon an erroneous view of the relationship between Congressional and territorial legislation. The error of that view has already been established by this Court in *Grafton* v. *United States* (1907) 206 U. S. 333, so that the apparent conflict between the decision of the Court of Appeals in this case and the opinions of the Montana, Wyoming, Utah and Oklahoma courts has been resolved by this Court and, therefore, is no reason for granting the writ of certiorari.

Petitioner advances the argument that this Court did not hold the territorial statute invalid in the *Grafton* case, but simply held that Grafton was protected against conviction under the statute by reason of the guaranty against double jeopardy. This was of course because the Court there needed only to discuss the question of double jeopardy. See 206 U. S. at page 355.

Here, however, in view of the fact that petitioner properly concedes[1] that the Puerto Rican Act of March 14, 1907 is invalid if it conflicts or is inconsistent with the Sherman Act, it is clear that the principle upon which the *Grafton* case rests conclusively establishes the invalidity of the insular Act. There can be no doubt that the guaranty against double jeopardy would prohibit a conviction under both the local law and the Sherman Act. It follows that any enforcement of the Puerto Rican Act—indeed, any attempted enforcement pursued far enough to put the accused in jeopardy—would preclude enforcement of the Sherman Act with respect to the same offense. If both laws could not be enforced, the conclusion is irresistible that they are inconsistent.

The conflict is not conceptual only; it is a reality of every-day administration. The relationship between insular prosecutors and federal authorities is delicate at best, requiring friendly cooperation and mutual helpfulness. No temptation to destroy this essential spirit should be injected by tolerating a situation affording opportunity for the development of competitive antagonism and jealousy. Motivated by these impulses, insular officials by premature or ill-advised actions might well thwart adequate federal en-

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[1]Petitioner's brief, page 23.

forcement. If desire for public acclaim or political aggrandizement should induce local and federal authorities to vie with each other in a race for jurisdiction, acquittals might result from hasty and inadequate prosecution. Since both laws cannot be enforced with respect to the same offense, their contemporaneous existence is conflicting and inconsistent.

The principle established by the *Grafton* case that a person may not be punished for the same offense against both the United States and a territorial government compels the conclusion that a territorial statute making an offense against the United States also an offense against the territorial government is inconsistent and in conflict with the federal law, and is consequently invalid. The *Grafton* case must, therefore, be regarded as settling the only important question of federal law presented by this case.

We will submit here a brief review of the earlier territorial cases.

(i) In *Territory* v. *Guyott* (1889) 9 Mont. 46, Guyott had been convicted of selling whisky to an Indian in violation of a statute of the Territory of Montana. The court held that the statute was valid, although an Act of Congress then in force made it a criminal offense against the United States to sell spirituous liquors to any Indian under the charge of any Indian superintendent or agent. Since this Act of Congress purported to be only a regulation of commerce with the Indian tribes and not a regulation of the liquor traffic in the territories, it may be that the decision can be justified on the ground that there was no conflict between the Congressional act and the territorial statute. However, the opinion of the court undoubtedly adopted a view of the relation between Congressional and territorial legislation which is no longer tenable in view of the decision in the *Grafton* case.

(ii) *In re Murphy* (1895) 5 Wyo. 297, held valid a territorial statute punishing bigamy as a crime, although an Act of Congress made the same act an offense against the United States. The court said in part:

> "The constitutional provision against a second jeopardy invoked here, and the general principle which refuses the right to place one twice in jeopardy, does not inhibit the twice putting in jeopardy for the same act, but for the same offense. That, by one and the same act, a person may offend and violate the laws of more than one sovereignty to whom he owes allegiance and may be punishable under the laws of each such sovereignties is well settled, and upon reasoning which appears to us entirely sound not only but merits our approval as emanating from many courts of high distinction and acknowledged ability. * * *"

This doctrine was expressly rejected in the *Grafton* case, in so far as sought to be applied to territorial legislatures. Thus, the Wyoming court further said:

> "The territorial legislature has as complete authority fundamentally to enact the law and punish the crime especially if it be an offense punishable as at common law as the legislature of a State. The territory not only possesses as much power to protect its people in their peaceful avocations and guard them against the commission of those crimes which offend the moral sense and render property and life insecure, but it is as fully their duty to do so as it is of a State government."

This viewpoint was expressly rejected by this Court in the *Grafton* case, saying, 206 U. S. at page 354:

> "The Government of the United States and the governments of the several States in the exercise of

> their respective powers move on different lines * * *. The same act, as held in *Moore's case* [14 How. 13], may constitute two offenses, one against the United States and the other against a State. But these things cannot be predicated of the relations between the United States and the Philippines. The Government of a State does not derive its powers from the United States, while the Government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States. The jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount. So that the cases holding that the same acts committed in a State of the Union may constitute an offense against the United States and also a distinct offense against the State, do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government—that of the United States".

(iii) In *State* v. *Norman* (1898) 16 Utah 457,[2] the court affirmed a conviction of adultery against the contention that the act of the territorial legislature making polygamy, adultery and other kindred offenses crimes was never

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[2]The earlier Utah case of *Knudsen* v. *Hannberg*, 8 Utah 203, is not in point, because the territorial statute did not cover the same subject matter as the Act of Congress. The Act of Congress provided that "a widow shall be endowed of one-third part of all lands whereof her husband was seized of an estate of inheritance at any time during the marriage." The territorial statute provided that a surviving spouse was entitled to inherit one-third part of the property of an intestate. The territorial statute did not have any effect upon the widow's right to dower, but simply related to her right of intestate succession, which was in addition to all dower rights.

a valid law of the Territory of Utah because of an Act of Congress declaring the same acts to be offenses against the United States, and that the territorial statute therefore never became a valid law of the State of Utah. In concluding that the territorial statute did not conflict with the Congressional legislation and was therefore valid, the court said:

> "The fact that an offender might thus possibly be subjected to a second punishment for the same act did not render the act of 1892 void. Each inhabitant of the territory of Utah was also an inhabitant of the United States, and was therefore a subject of each government, and owed allegiance to and was amenable to the laws of each. If, therefore, he perpetrated an act which constituted an offense against the United States, and also an offense against the territory and its local laws, we know of no legal principle which prevented him from becoming subject to punishment by each government, and neither of such punishments would be in contravention of the constitutional inhibition against the twice putting in jeopardy for the same offense. That inhibition does not operate as to the act, but as to the offense, and an offense, in legal significance, is the transgression of a law. * * *"

The dissenting judge in that case pointed out the fallacy of this reasoning when he said:

> "It is also said that the state may pass a law defining counterfeiting as a crime, and punishing it, and the United States may pass a similar law. In that case the state law is for the protection of its people, and not for the people of the United States. The source and purpose of such laws differ. One proceeds from state sovereignty; the other from the sovereign power of the United States. The one law is for the protection of the people of the state;

> the other is for the protection of the people of the United States. One is to punish the wrong to the state; the other the wrong to the United States. They do not exercise the same power as congress and the territory do in legislating for the territory. The congressional law and the territorial law in this case proceed from the same source,—from the United States,—and are for the same territory and the same people. It is the same power, exercised in the one case by congress, and in the other by the territory.
>
> "It would appear strange, indeed, if the territorial legislature, the instrumentality of congress, could exercise the same power, in punishing the same offense against the same people, after congress had itself exercised it, and punished the same offense against the same people. In that case, the act of the territorial legislature is vain and of no effect. * * *"

The dissent was obviously in accord with the later decision and opinion of this Court in the *Grafton* case.

(iv) In *Territory* v. *Long Bell Lumber Co.* (1908) 22 Okl. 890, it was held that the territorial anti-trust law was valid despite the prior enactment by the Congress of the Sherman Act. The court followed and quoted from the *Murphy* case in Wyoming, *supra,* and so held:

> "Nor is it any argument against the validity of this act that a violator of it was liable to be prosecuted twice for the same offense. *In re Murphy,* 5 Wyo. 297, 40 Pac. 398; *Harlan* v. *People,* 1 Doug. (Mich.) 207; *Miners' Bank* v. *State of Iowa,* 12 How. 1, 13 L. Ed. 867. The rule in this respect is properly declared by the Supreme Court of Montana in the case of *In re Murphy, supra,* as follows * * * "

Once again, therefore, the decision of a territorial court was directly contrary to the later decision of this Court in the *Grafton* case. The *Long Bell Lumber* decision was followed in *Wagner* v. *Minnie Harvester Co.* (1910) 25 Okl. 558.[3]

(v) Directly contrary to the foregoing decisions was that of the Supreme Court of the Territory of Arizona, in *Territory* v. *Alexander,* 11 Ariz. 172. The Arizona court said:

> "It seems to us that the Wyoming, Montana, and Utah courts, in the cases referred to, holding that this rule applies in a territory as in a state, overlook the distinction between a territory and a state in their relation to the United States. A territory is not a sovereignty. Such legislative powers as it may possess are delegated powers which may be granted or withheld at the will of Congress. *National Bank* v. *Yankton,* 101 U. S. 129, 25 L. Ed. 1046. An offense against a federal law and an offense created by the territorial statute are both in effect offenses against the sovereignty of the United States."

This reasoning was clearly in accord with that of this Court in the *Grafton* case, *ubi supra,* 206 U. S. at page 354.

The petitioner seeks to explain away the error of these courts (other than Arizona) by saying that their "mistaken impression was no essential part of the underlying reasoning" (Petitioner's brief, p. 41). This is of course to uphold the doctrine that a territorial statute may cover the same ground as a federal statute, notwithstanding that the necessary result may be to destroy the effectiveness of enforcement of the federal statute.

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[3]Both Oklahoma cases were decided shortly after the decision of this Court in the *Grafton* case; but it does not appear that the latter decision was called to the attention of the Oklahoma court.

Moreover, examination of the adverse territorial decisions themselves indicates that the courts addressed themselves directly to the question whether the same act could constitute an offense against both the territorial and federal governments. Had an answer to this question not been essential to the disposition of the cases, the courts could readily have diposed of the issue by saying that no question of double jeopardy arose since there had been no prosecution under the federal law. Instead, they examined the question fully, and it was only on the basis of their erroneous conclusion that the same act could constitute an offense against both territorial and federal governments that they were able to find the laws consistent. It is clear that the courts regarded the issue as determinative of the validity of the territorial legislation.

II.

THE PRINCIPLE OF THE DECISION IN *EL PASO & N. E. RY.* v. *GUTIERREZ*, 215 U. S. 87, HAS FURTHER RESOLVED THE SUGGESTED CONFLICT OF AUTHORITIES AND SETTLED THE ONLY IMPORTANT QUESTION OF FEDERAL LAW PRESENTED.

Territorial legislation is invalid not only when it conflicts with an act of Congress, but also when the Congress has enacted legislation covering the same subject matter.[4]

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[4]But respondent's reliance in this brief on the fact that the two statutes relate to the same subject matter and cover the same field does not import acquiescence in petitioner's contention that there is no substantive conflict between the two. The differences in language are not such as to change in any way the subject matter and field of operation of the two statutes, which remains identical, but they are sufficient to suggest that different and conflicting interpretations may well result.

El Paso & N. E. Ry. Co. v. *Gutierrez*, 215 U. S. 87, was a suit brought under the first Employers' Liability Act to recover damages because of death sustained by reason of defendant's wrongful act within a territory. The defendant set up the defense that it had not been served with timely notice of the injury as required by a territorial statute as a condition precedent to commencing suit. This Court affirmed a judgment against the defendant, holding that the defense was insufficient since the territorial statute was invalid because it covered the same subject matter as the Act of Congress.[5] The Court expressly approved the application of the rule in the *Gutierrez* case to a case involving laws to regulate commerce, saying, at page 93:

> "In view of the plenary power of Congress under the Constitution over the Territories of the United States, subject only to certain limitations and prohibitions not necessary to notice now, there can be no doubt that an act of Congress undertaking to regulate commerce in the District of Columbia and the Territories of the United States would necessarily supersede the territorial law regulating the same subject."

Petitioner contends that this decision can be explained upon the ground that there was a conflict between the terri-

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[5]The decision had been forecast in *Davis* v. *Beason*, 133 U. S. 333, in which the Court, although upholding the territorial statute in the particular case, had said, at page 348:

> "The cases in which the legislation of Congress will supersede the legislation of a State or Territory, without specific provisions to that effect, are those in which the same matter is the subject of legislation by both. There the action of Congress may well be considered as covering the entire ground. * * *"

torial and Congressional legislation. It is true that this Court could have based its decision on that ground, but instead it preferred to lay down the broad proposition that the territorial legislation was invalid because it covered the same subject matter.[6]

III.

THE CONFLICT OF AUTHORITIES IS NOT OF SUCH A NATURE AS TO FALL WITHIN THE REASON FOR THE POLICY IN FAVOR OF GRANTING CERTIORARI IN CASES OF CONFLICT BETWEEN THE CIRCUITS.

If the reason for granting certiorari in cases of conflict between the circuits is to produce uniformity of decision, the present case does not appear to be an appropriate one for application of that policy. None of the cases cited by petitioner to establish the existence of a conflict was decided by a court before which the question is likely to arise today. No controlling authority, therefore, would compel any court to reach a result contrary to that reached by the Court of Appeals for the First Circuit in this case.

IV.

THE PETITION WAS UNDULY DELAYED.

The judgment of the Circuit Court of Appeals was entered November 20, 1936. The normal statutory time for

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[6]**The Supreme Court of Puerto Rico clearly regarded the *Gutierrez* case as conclusive of the invalidity of the Puerto Rican Act of March 14, 1907, even though it thought that there was no conflict between that law and the Sherman Act. See *The United Theatres, Inc.* v. *The District Court of San Juan*, set forth in Appendix II to the Petition herein, at page 61.**

filing the petition herein expired February 20, 1937. As a result of two extensions, however, of neither of which the respondent had notice, the filing of the petition herein, although nearly five months after the decision of the Circuit Court of Appeals, is within the statutory requirements as to time.

The statutory period of three months is already unusually long in the light of modern practice in appellate courts, both state and federal. Undue delays in filing petitions are, we submit, contrary in spirit to the expedition which this Court imposes upon itself in the dispatch of its business, once the petition for certiorari has been filed.

The unfortunate effect of such delays is well illustrated in the present case. Argued in October, it was decided by the Circuit Court of Appeals in November. A single question of law is involved. Obviously, if the case were ever to be reviewed by this Court, it should have been heard and determined at the present term. Yet it must now be carried over, if the petition be granted, so that in effect it will have required a full year for this Court to review a single question of law after its decision by the Circuit Court of Appeals.

Respectfully submitted,

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